Supreme Court, U.S.
FILED
MAR 3 1997
CLERK

(2)

No. 96-1210

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

APRIL BRANNAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC. IN SUPPORT OF UNITED STUDENT AID FUNDS, INC.'S PETITION FOR A WRIT OF CERTIORARI

THOMAS C. ANDERSON
Counsel of Record
JEAN S. FROHLICHER
THE NATIONAL COUNCIL
OF HIGHER EDUCATION
LOAN PROGRAMS, INC.
801 Pennsylvania Avenue, S.E.
Suite 375
Washington, D.C. 20003

Counsel for *Amicus Curiae*

21 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
REASONS FOR GRANTING THE WRIT	4
I. THE APPLICATION OF THE FAIR DEBT COLLECTION PRACTICES ACT TO PRIVATE NONPROFIT GUARANTY AGENCIES HAS CREATED INCONSISTENT LEGAL OBLIGATIONS AND ADVERSELY IMPACTED THE ORDERLY ADMINISTRATION OF AN IMPORTANT FEDERAL PROGRAM	6
A. The Ninth Circuit's Ruling Injects Uncertainty Into the FFEL Program	8
B. The Ninth Circuit's Ruling Creates An Intolerable Threat of FDCPA Liability	12
C. The Ninth Circuit's Ruling Undermines The Need For Uniformity	13
II. THE FAIR DEBT COLLECTION PRACTICES ACT DOES NOT APPLY TO THE COLLECTION ACTIVITIES OF PRIVATE NONPROFIT GUARANTY AGENCIES	14
CONCLUSION	17

TABLE OF AUTHORITIES

Cases Page

Edler v. Student Loan Marketing Association, No. 92-1619, 1993 WL 652270 (D.D.C. Dec. 13, 1993) 5
Fischer v. Unipac Service Corp., 519 N.W.2d 793 (Iowa 1994) 5
Games v. Cavazos, 737 F. Supp. 1368 (D. Del. 1990).....5, 15-16
Juras v. Aman Collection Service, Inc., 829 F.2d 739 (9th Cir. 1987), *cert. denied*, 488 U.S. 875 (1988) 10
Leerssen v. United Student Aid Funds, Inc., No. 94 CV 4868 (Colo. Dist. Ct. Sept. 21, 1995) 5
Student Loan Fund of Idaho v. Duerner, No. CV-OC-95-02576* 5

Statutes, Regulations and Rule

15 U.S.C. § 1692, *et seq.* (1994) ..... *passim*
Higher Education Act, 20 U.S.C. §§ 1001 *et seq* (1994).....2, 8, 15
34 C.F.R. § 682.200 15
34 C.F.R. § 682.406 (1996) 6
34 C.F.R. § 682.410 (1996) ..... *passim*
34 C.F.R. § 682.413 (1996) 8, 11
Supreme Court Rule 37 (1996)..... 1, 4

Miscellaneous

55 Fed. Reg. 40,120 (Oct. 1, 1990) 3
61 Fed. Reg. 60,478, (Nov. 27, 1996) 13

TABLE OF AUTHORITIES — Continued

United States Department of .... Education, Office of Postsecondary Education, Loan Volume Update, Federal Family Education Loan Program, Fiscal Year 1996 (Jan. 1997..... 2, 8

United States Department of Education, Report to the President on Student Loan Default Initiative (Jan. 9, 1997)..... 3, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STUDENT AID FUNDS, INC.,
Petitioner,

v.

APRIL BRANNAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF *AMICUS CURIAE* NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC. IN SUPPORT OF UNITED STUDENT AID FUNDS, INC.'S PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*[1]

The National Council of Higher Education Loan Programs ("NCHELP") is a nationwide network of state and private nonprofit guaranty agencies, secondary markets, lenders, loan servicers and other organizations involved with guaranteed student loans for postsecondary education under the Federal Family Education Loan ("FFEL") program.[2]

---

[1] Letters from the parties consenting to the filing of this *amicus curiae* brief have been filed with the Clerk of Court in accordance with Supreme Court Rule 37.2 (a) (1996).

[2] Petitioner United Student Aid Funds, Inc. ("USA Funds") is a member of NCHELP.

NCHELP was founded in 1962, incorporated in 1982, and currently has 151 organizational members throughout all fifty states.

NCHELP's guarantor members are either State or private nonprofit guaranty agencies, the only two entities who can fulfill the role of guarantor under the Higher Education Act of 1965, 20 U.S.C. §§ 1001 *et seq.* (1994) ("HEA"), and its implementing regulations. Our guarantor members — whether by direction of state legislatures or their nonprofit founders — carry out the mission of helping our nation's youth obtain education beyond the high school level.

The FFEL program is the nation's single largest source of financial aid for students seeking that education. Over the past 30 years, lenders participating in the FFEL program have directed approximately $200 billion in private capital to more than 75 million students and their parents, enabling financing for vocational, college, graduate, and professional education and training.[3] Many of these loans were guaranteed by NCHELP's guarantor members. According to January 1997 statistics maintained by the United States Department of Education (the "Department"), in Fiscal Year 1996 alone NCHELP's members guaranteed in excess of 5,300,000 loans valued at almost $20 billion.[4] Our members thus play a pivotal role in the administration and implementation of this important national program.

NCHELP is committed to the integrity and continued viability of the FFEL program. NCHELP's guarantor members support these goals by performing "due diligence" activities mandated by HEA and its implementing

---

[3] *See* United States Department of Education, Office of Postsecondary Education, at 10 Loan Volume Update, Federal Family Education Loan Program, Fiscal Year 1996 (Jan. 1997).

[4] *Id.* at 6.

regulations in regard to the collection of defaulted student loans. As the Department itself has recognized, these "due diligence" activities are critical to the success of the FFEL program because they reduce the overall loan default rate, and ensure the availability of financial assistance for all students who need it to pursue postsecondary education. *See, e.g.*, 55 Fed. Reg. 40,120 (Oct. 1, 1990).

Recent statistics from the Department confirm the efficacy of these activities: "[f]or the third consecutive year, the rate of student loan defaults has reached an all-time low." United States Department of Education, Report to the President on Student Loan Default Initiative, at 1 (Jan. 9, 1997) (hereafter "Report to the President") Indeed, the amount of defaulted student loan collections by the federal government and guaranty agencies more than doubled from $1 billion in Fiscal Year 1992 to $2.2 billion in Fiscal Year 1996. As a result, net default costs decreased over 85% during that same period, from $1.7 billion in Fiscal Year 1992 to $249 million in Fiscal Year 1996. *Id.* at 3-4.

The Ninth Circuit ruling from which review is sought poses a fundamental threat to these salutary purposes. In this case, respondent Brannan seeks to ascribe monetary liability under the federal Fair Debt Collection Practices Act ("FDCPA") apparently based on some of the very "due diligence" activities *required* of guarantors by HEA and its implementing regulations. Although the district court agreed with petitioner USA Funds that the FDCPA did not apply to this kind of activity when undertaken by a guaranty agency, the Ninth Circuit reversed, concluding that respondent Brannan stated a claim for alleged violations of the FDCPA.

Accordingly, this case presents an important question concerning the interpretation of two federal statutes that, if simultaneously applicable, impose inconsistent and

conflicting legal obligations on nonprofit guaranty agencies.[5] NCHELP believes that if the Ninth Circuit's decision escapes review, and the inconsistent legal obligations of HEA and the FDCPA continue to be simultaneously applicable, then nonprofit guaranty agencies will be hampered in their efforts to administer the millions of individual loans outstanding in this multi-billion dollar federal program.

NCHELP agrees with petitioner USA Funds that Congress did not intend for the FDCPA to apply to private nonprofit guaranty agencies. Pursuant to Supreme Court Rule 37.1, it is not our purpose to restate those arguments. Rather, we appear as an *amicus curiae* to address, from the unique perspective of our collective membership, the serious practical disruptions arising from the Ninth Circuit's conclusion that the FDCPA's restrictions are applicable to nonprofit guaranty agencies. Regardless of whether the Court is ultimately persuaded that the Ninth Circuit's conclusion was erroneous, the uncertainty created by this decision — and the adverse impact it has had on the administration of the FFEL program generally — necessitates review by this Court.

REASONS FOR GRANTING THE WRIT

The question presented by this case is whether a nonprofit student loan guaranty agency, bound to follow the collection mandates of HEA, may be subject to civil liability under the FDCPA for following those very collection mandates.

The Ninth Circuit's answer to that question is: (1) contrary to the conclusion reached by the majority of courts

---

[5] The subject ruling does not purport to reach State guaranty agencies, which continue appropriately to be immune from civil actions under the FDCPA.

that have considered this issue (including one state supreme court);[6] (2) inconsistent with the understanding of the two federal agencies charged with administering HEA and the FDCPA;[7] and (3) based on a fundamental misunderstanding of the FDCPA.[8] In any event, the Ninth Circuit's decision has created an irreconcilable conflict between HEA and the FDCPA, and simultaneously has injected uncertainty and instability into the administration of this important national program. This uncertainty, moreover, has left nonprofit guaranty agencies to speculate over their rights, obligations and liabilities under these statutes, and has hindered the ability of nonprofit guaranty agencies to carry out their normal day-to-day operations. Accordingly, it is essential that this Court resolve these conflicts without delay.

---

[6] *See Fischer v. Unipac Service Corp.*, 519 N.W.2d 793, 801 (Iowa 1994); *Games v. Cavazos*, 737 F. Supp. 1368, 1388 (D. Del. 1990); *Edler v. Student Loan Marketing Ass'n*, No. 92-1619, 1993 WL 652270 at *2 (D.D.C. Dec. 13, 1993); *Leerssen v. United Student Aid Funds, Inc.*, No. 94 CV 4868 (Colo. Dist. Ct. Sept. 21, 1995). *But see Student Loan Fund of Idaho v. Duerner*, No. CV-OC-95-02576*D (Idaho Dist. Ct. Apr. 6, 1996), *review pending*, No. 23262 (Idaho).

[7] *See* Appendix to Petition for a Writ of Certiorari, United Student Aid Funds, Inc., No. 96-1210, at 88a-95a (filed Jan. 29, 1997) (hereafter "Petitioner's Appendix").

[8] *See* Petition for a Writ of Certiorari, United States Aid Funds, Inc., No. 96-1210, at 20 (filed Jan. 29, 1997) (hereafter "Petition") (discussing S. Rep. No. 382, at 2, 95th Cong. 1st Sess., *reprinted in* 1977 U.S.C.C.A.N. 1695, 1696 (noting that the purpose of the FDCPA was to respond to "debt collection abuse by third party debt collectors")).

I. THE APPLICATION OF THE FAIR DEBT COLLECTION PRACTICES ACT TO PRIVATE NONPROFIT GUARANTY AGENCIES HAS CREATED INCONSISTENT LEGAL OBLIGATIONS AND ADVERSELY IMPACTED THE ORDERLY ADMINISTRATION OF AN IMPORTANT FEDERAL PROGRAM.

The Ninth Circuit's conclusion that the FDCPA applies to private nonprofit guaranty agencies has created conflicting mandates for nonprofit guaranty agencies.

As a condition of maintaining compliance with HEA and thereby obtaining reinsurance payments from the Secretary — which are critical to the operation of the FFEL program — the Department's regulations require guaranty agencies to undertake certain affirmative "due diligence" activities in connection with the collection of defaulted loans. *See* 34 C.F.R. § 682.406(a)(11) (1996) ("A guaranty agency is entitled to reinsurance payments on a loan only if . . . [t]he agency exercised due diligence in collection of the loan in accordance with [34 C.F.R.] § 682.410(b)(6) or (7).").

The FDCPA, however, places certain restrictions on the activities of "debt collectors." Under the FDCPA, nonprofit guaranty agencies would be prohibited from engaging in some of the very activities that HEA requires.[9] If HEA and the FDCPA were to apply to nonprofit FFEL guarantors,

---

[9] As USA Funds' petition for certiorari demonstrates, Congress, in defining the term "debt collector," did not intend to include nonprofit guaranty agencies, and, *a fortiori*, did not intend to impose on nonprofit guaranty agencies any conflicting statutory obligations. *See* Petition at 19-21 (explaining that nonprofit guaranty agencies are not "debt collectors" under the FDCPA, and that the legislative history of the FDCPA confirms that Congress did not intend for it to apply to nonprofit guaranty agencies). Nevertheless, the Ninth Circuit determined USA Funds was a "debt collector" subject to the FDCPA.

then compliance with the former statutory scheme would raise the specter of monetary liability under the latter.

Examples of the inconsistent obligations resulting from the Ninth Circuit's ruling include the following:

- HEA regulations require guaranty agencies to communicate with the borrower at certain time intervals, 34 C.F.R. §§ 682.410(b)(6)(iii)-(ix), while the FDCPA requires that a debt collector terminate communications at the borrower's request, 15 U.S.C. § 1692c(c);
- HEA regulations require nonprofit guaranty agencies to communicate directly with borrowers, 34 C.F.R. § 682.410(b)(6)(iii), while the FDCPA prohibits such contact once the borrower retains counsel, 15 U.S.C. § 1692c(a)(2);
- HEA regulations require nonprofit guaranty agencies to attempt diligently to find a borrower whose location is unknown, 34 C.F.R. § 682.410(b)(6)(xii), while the FDCPA generally prohibits more than one contact with a third party for this purpose (unless the initial information received was incorrect and correct information is now available), 15 U.S.C. § 1692b(3); and
- HEA regulations require nonprofit guaranty agencies to inform a borrower shortly after default of the possibility of civil litigation in the event of nonpayment, 34 C.F.R. §§ 682.410 (b)(5)(ii)(A), (b)(5)(vi)(L), but subsequently authorizes the agency to decline to file suit if it is unlikely to lead to repayment. *Id.* §§ 682.410(6)(vii)(B). Under the FDCPA,

> however, a collector who states that it will file suit, but does not actually intend to do so, may be sued for "false misrepresentations," 15 U.S.C. §§ 1692e(4), (5).

In short, the Ninth Circuit's ruling creates a Hobson's choice for nonprofit guaranty agencies. On the one hand, a nonprofit guaranty agency that complies with HEA will risk FDCPA liability; on the other hand, such an agency that does not comply with HEA will face a range of possible sanctions by the Secretary, including possible suspension from the FFEL program. *See* 20 U.S.C. § 1082(h)(1); *see also* 34 C.F.R. §§ 682.410(c), 682.413(c)(1). As the following discussion illustrates, the mere existence of these conflicting directives detrimentally impacts the administration of the FFEL program and harms its ultimate beneficiaries, the student borrowers.

A. The Ninth Circuit's Ruling Injects Uncertainty Into the FFEL Program

Nonprofit guaranty agencies now face serious uncertainty in attempting to conduct their daily collection operations. As noted, the nation's network of guaranty agencies is responsible for administering hundreds of thousands — and, in the case of USA Funds, millions — of student loans. (In Fiscal Year 1996 alone, petitioner USA Funds serviced over 1,320,000 loans valued at approximately $5.3 billion. *See* United States Department of Education, Office of Postsecondary Education, Loan Volume Update, Federal Family Education Loan Program, Fiscal Year 1996, at 6 (Jan. 1997)). For each loan that goes into default, HEA regulations require a guaranty agency to initiate collection activities, within 45 days after it paid the default payment to the lender, by sending written notices directly to each defaulted borrower and "diligently" attempting to contact the

borrower by telephone. *See* 34 C.F.R. §§ 682.410 (b)(6)(iii)(A)-(B).

Thus, before collection activities are even initiated on the first defaulted loan, a guaranty agency must confront its conflicting obligations. To whom should the initial notices be sent? HEA regulations require the notices to be sent to the borrower directly;[10] but if, as is often the case, the borrower is represented by counsel, the FDCPA prohibits direct contact with the borrower and requires contact to be made through counsel. *See* 15 U.S.C. § 1692c(a)(2). Thus, the seemingly straightforward task of sending notice takes on a new dimension if a nonprofit guarantor must also take into account the subject ruling of the Ninth Circuit.

What if the borrower responds to the first notice and demands that the agency cease all further communications? HEA regulations require the guaranty agency to send additional notices to the borrower,[11] and to "diligently" attempt to contact the borrower by phone; the FDCPA, however, mandates that, upon written request by the borrower, a guaranty agency must cease any further contact with the borrower. *See* 15 U.S.C. § 1692c(c). Once again, an apparently routine task performed by a nonprofit guaranty agency on a daily basis is suddenly complicated by the potential for FDCPA liability.

Resolution of these conflicting mandates must be prompt to comply with the 45-day window established by HEA regulations.[12] Yet the resolution of these issues is only the beginning of the conflict between these statutory schemes,

---

[10] *See* 34 C.F.R. § 682.410(b)(6)(iii) (1996) ("[T]he agency shall ... *[s]end to the borrower* the written notice ... and ... [d]iligently attempt to contact *the borrower* by telephone.") (emphases added).

[11] *See* 34 C.F.R. §§ 682.410(b)(5)(ii), (6)(iii).

[12] *See* 34 C.F.R. § 682.410(b)(6)(iii).

not the end of it. HEA regulations next requires guaranty agencies to undertake certain activities over the next 135 days, activities that includes contacting the borrower by telephone, sending at least three notices "forcefully demanding" repayment, and advising the borrower of the possibility of civil litigation in the event of continued nonpayment. *See* 34 C.F.R. §§ 682.410(b)(6)(iv)(A)-(B). Although a nonprofit guaranty agency must advise the borrower of the possibility of litigation, the regulations give the agency discretion to decline to pursue such litigation if, for example, it concludes the borrower would not be financially able to pay the debt. *See* 34 C.F.R. §§ 682.410 (b)(6)(vii)(B)(1)-(2).

Under the Ninth Circuit's reading of the FDCPA, however, a nonprofit guaranty agency could be subject to suit for making a "false representation" by advising the borrower of the possibility of filing suit if it did not actually intend to file suit. *See* 15 U.S.C. §§ 1692e(4), (5); *see also Juras v. Aman Collection Service, Inc.*, 829 F.2d 739, 744 (9th Cir. 1987) (reversing the district court's dismissal of plaintiff's FDCPA claim against an independent collection agency based on an allegedly false representation; "[i]f [the collection agency] did not intend to employ counsel in California [as it stated], this threat violated the [FDCPA]."), *cert. denied*, 488 U.S. 875 (1988). Thus, in addition to the concerns about whom it may contact and whether such contact is permissible, a nonprofit guaranty agency now must also consider the possibility of litigation arising out of a representation that it may ultimately file suit.

Yet this FDCPA-induced hesitation is contrary to the goal of HEA: forceful collection, through potential and actual litigation, of defaulted student loans. Indeed, in a recent report, the Department reaffirmed the efficacy of the aggressive use of civil litigation as a means of obtaining

payment from defaulting student borrowers. *See* Report to the President at 3.[13]

The Ninth Circuit's ruling, moreover, imperils nonprofit guarantors with their regulator, the Department. Each of the "due diligence" activities described above (and others) must take place within a specified time period. If in the course of conducting these activities, a nonprofit guaranty agency fails to take any action within the prescribed time periods, or otherwise "violates any applicable Federal requirement," then the Secretary may withhold reinsurance payments from the guaranty agency, suspend or terminate its agreement with the agency, and even fine the agency for its noncompliance. *See* 34 C.F.R. §§ 682.413(c)(1)(ii), (iv), (v). But if the nonprofit guaranty agency does comply in a timely fashion with these requirements, it may face claims of civil liability under the FDCPA.

The imposition of FDCPA liability on nonprofit guaranty agencies thus creates an unworkable situation for the daily operations of nonprofit guaranty agencies and their employees. As a result of the Ninth Circuit's decision, these agencies now find themselves confronting an unmanageable situation. These concerns are real and immediate, directly affecting the agencies' ability to administer the FFEL program. Guaranty agencies must make important decisions involving these issues on a daily basis. Substantial sums of money are at issue, as is the ability of lenders and nonprofit guarantors to make funds available to all students wishing to

---

[13] The continued successful use of civil litigation as a tool to combat defaulting student borrowers may well be stifled because of the newfound threat of FDCPA litigation. Whether asserted as a counterclaim in a suit brought by the guarantor to collect on a note or, as in this case, as a separate lawsuit initiated by a plaintiff-debtor, FDCPA claims against nonprofit guaranty agencies would likely become a commonplace feature in most civil suits seeking to vindicate the federal interest by collecting on a defaulted loan payment.

pursue higher education. At a minimum, the Ninth Circuit's extension of the FDCPA to nonprofit guaranty agencies unjustifiably interferes with the orderly administration of the FFEL program by infusing uncertainty into the decisionmaking process. Accordingly, review should be granted to resolve these conflicts and restore stability to the FFEL program.

B. The Ninth Circuit's Ruling Creates An Intolerable Threat of FDCPA Liability

The mere threat of FDCPA liability will inevitably deter some nonprofit guaranty agencies from vigorously engaging in the "due diligence" activities mandated by HEA regulations. As noted above, the Ninth Circuit's ruling will deter the use of civil litigation as an effective tool for securing repayment from defaulting borrowers. *See supra*, at 11 & n.13. This ruling has other deleterious consequences. For example, the threat of FDCPA claims by debtors against nonprofit guarantors will result in higher overall loan default rates because of diminished collection efforts. Higher rates, in turn, place an unnecessary strain on the federal fisc (and the cost of operating the FFEL program), whose funds are used to compensate guaranty agencies for default payments to lenders. Ultimately, the depletion of available monies will restrict the number of students who may obtain federal funds to pay for their college education.

As an organization whose members are dedicated to expanding, rather than limiting, the range and number of educational opportunities available to all students, NCHELP believes that the Ninth Circuit's ruling is contrary to the intent of both Congress and of the federal agencies charged with administering HEA and the FDCPA. Indeed, the Department and the Federal Trade Commission — the

federal agencies charged with enforcing HEA and the FDCPA, respectively — have explained their understandings that the FDCPA does not apply to nonprofit guaranty agencies. *See* Appendix to Petition for a Writ of Certiorari, United States Aid Funds, Inc., No. 96-1210, at 88a-95a (filed Jan. 29, 1997) (hereafter "Petitioner's Appendix"). Nevertheless, the possibility of FDCPA liability remains. At a minimum, the Ninth Circuit should be required to consider the impact of the Department's recent rulemaking declaration about the non-application of the FDCPA to guaranty agencies, 61 Fed. Reg. 60,478 (Nov. 27, 1996), Petitioner's Appendix at 98a, as suggested in USA Funds' petition for certiorari. *See* Petition for a Writ of Certiorari, United States Aid Funds, Inc., No. 96-1201, at 19 n.17 (filed Jan. 29, 1997) (hereinafter "Petition").

C. The Ninth Circuit's Ruling Undermines The Need For Uniformity

The FFEL program allows millions of Americans nationwide to obtain postsecondary education, and the administration of this program should be judged according to a single uniform standard of conduct. Ironically, although the subject ruling of the Ninth Circuit recognizes this need for uniformity in discussing the preemptive effect of the Secretary's regulations on inconsistent state law, *see* Petitioner's Appendix at 8a,[14] the opinion overlooks conflicting decisions from other jurisdictions that have held that the FDCPA does not apply to guaranty agencies. *See supra,* at 5 & n.6. In so holding, the Ninth Circuit has sought to eliminate the risks attendant to the application of inconsistent state law, while simultaneously creating an

---

[14] NCHELP agrees with the Ninth Circuit's conclusion that HEA and its implementing regulations preempt inconsistent state law.

inconsistent body of federal law with respect to the applicability of the FDCPA. Respondent's claim highlights this inconsistency, involving as it does, a loan from a Kansas bank; a guaranty agency from Indiana; and a former student residing in Oregon who attended school in Oregon. *See* Petition at 18-19. As this typical factual scenario indicates, it will be extraordinary difficult for a nonprofit guaranty agency to know what circuit's law will be employed to judge the lawfulness of its actions.

While a lack of uniformity is unmanageable in most business settings, it is especially pronounced in the context of a large national program that involves multiple parties (borrowers, lenders and guarantors) that may, and often will, reside in different states within different circuits. Accordingly, review should be granted to establish a single uniform standard of conduct.

II. THE FAIR DEBT COLLECTION PRACTICES ACT DOES NOT APPLY TO THE COLLECTION ACTIVITIES OF PRIVATE NONPROFIT GUARANTY AGENCIES.

As the foregoing discussion makes clear, the application of the FDCPA to nonprofit guaranty agencies has had, and will continue to have, significant practical consequences on the day-to-day administration of the FFEL program. These consequences are serious and merit a greater degree of attention than the cursory discussion of the Ninth Circuit. For a variety of reasons — which are adequately and cogently set forth in USA Funds' petition for certiorari, *see* Petition at 14-24 — NCHELP fully agrees that the FDCPA does not apply to any guaranty agency, and that Congress did not intend for it to so apply. NCHELP will not burden the Court by repeating the arguments supporting this conclusion; however, NCHELP does wish to reemphasize

one of those points which is of significant importance to its members.

By its own terms, the FDCPA exempts from its coverage "government actors," namely, "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). Nonprofit guaranty agencies are "government actors" under the FDCPA. These agencies operate at the explicit command of the federal government, pursuant to the terms of federal agreements, and the requirements of federal statutory and regulatory law; and they perform functions identical to those performed by their state guaranty agency counterparts. Indeed, the *only* entities that may act as loan guarantors under HEA are private nonprofit guaranty agencies and State guaranty agencies. *See* 20 U.S.C. § 1078(b)(1); 34 C.F.R. § 682.200 (defining a "guaranty agency" as a "State or private nonprofit organization"); *see also Games v. Cavazos*, 737 F. Supp. 1368, 1382 (D. Del. 1990) ("The loan is insured by a State or private guarantee agency such as USA Funds."); *id.* at 1388 ("The Guaranteed Student Loan Program may be administered by either a State guarantee agency or a private non-profit agency such as USA Funds.").

Games, 737 F. Supp. 1368, considered this issue and concluded that USA Funds was in fact a "government actor" so as to be exempt from the FDCPA.[15] *Id.* at 1387-88. The *Games* court relied heavily on the fact that USA Funds "administer[ed] a federal government program involving federal funds," *id.* at 1388, and that it had "entered into numerous [contractual] agreements" with the Department of Education. *Id.* at 1382. The *Games* court also noted the

---

[15] At issue in *Games* was USA Funds' participation in the federal tax offset program for recovery of defaulted student loan guarantees.

anomaly that would result if private nonprofit guaranty agencies like USA Funds were subject to the FDCPA, given the fact that their State counterparts would be excepted from such liability under the government actor exemption. "Since State guarantee agencies would not be subject to the FDCPA for their participation in the GSL Program, private guarantee agencies like USA Funds should likewise be protected." *Id.* at 1388.

Finding this rationale persuasive, the district court in this case concluded that "the FDCPA should not apply to private guarantee agencies under the GSL program." Petitioner's Appendix at 28a. The district court discussed *Games* extensively, and relied on the fact that USA Funds was "contractually bound" to engage in its "due diligence" requirements under HEA regulations. *Id.* at 27a. The Ninth Circuit's cursory, four-sentence discussion of the "government actor" exemption — which concludes that USA Funds is a private entity and not a government actor — begs the question by failing to address any of the contrary arguments espoused by the *Games* court or the district court that support the opposite conclusion.

CONCLUSION

For all of these reasons, NCHELP urges this Court to grant United Student Aid Funds, Inc.'s petition for a writ of certiorari.

Respectfully submitted,

THOMAS C. ANDERSON
Counsel of Record
JEAN S. FROHLICHER
THE NATIONAL COUNCIL
OF HIGHER EDUCATION
LOAN PROGRAMS, INC.
801 Pennsylvania Avenue, S.E.
Suite 375
Washington, D.C. 20003

Counsel for *Amicus Curiae*

March 3, 1997